IN THE COURT OF APPEALS OF THE STATE OF ALASKA

YAKO W. COLLINS,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12816

Trial Court No. 3PA-08-00803CR

CERTIFICATE OF SERVICE AND TYPEFACE

I, Deana Schubert, state that I am employed by the Alaska Department of Law, Office of Criminal Appeals, and that on January 28, 2021, I emailed a copy of the State's SUPPLEMENTAL BRIEF OF APPELLEE and this CERTIFICATE OF SERVICE AND TYPEFACE in the above-titled case to:

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APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT PALMER
HONORABLE JONATHAN WOODMAN, JUDGE

SUPPLEMENTAL BRIEF OF APPELLEE

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Filed in the Court of Appeals
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January _____, 2021

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VRA CERTIFICATION: I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

AUTHORITIES RELIED UPON

None.

STATEMENT OF ISSUE PRESENTED

Is a remand warranted to allow the superior court to consider whether a sentence within the presumptive range is manifestly unjust, when Yako Collins previously expressly withdrew a claim of manifest injustice, the underlying applicable sentencing laws have not meaningfully changed, and the sentencing judge already considered the relevant sentencing factors and the totality of the circumstances in imposing a sentence within the presumptive range?

STATEMENT OF THE CASE

The underlying factual and procedural history of this case was previously summarized in the State's initial briefing. [At. Br. 2-14]

ARGUMENT

I. A REMAND IS NOT APPROPRIATE

A. Standard of review

This Court reviews a sentencing judge's decision not to refer a case to the three-judge panel under the clearly mistaken standard of review. *See Harapat v. State*, 174 P.3d 249, 256 (Alaska App. 2007).

B. Some of the relevant history and this Court's tentative decision

In its tentative decision, this Court noted that in 2006, the Alaska Legislature amended the provisions of AS 12.55.125 to establish significantly higher presumptive sentencing ranges for offenders convicted of sexual felonies. *See Collins v. State*, A-12816, Tentative Decision at 2 (Dec. 8, 2020) ("Tentative Decision"). Since Collins committed his first-degree sexual assault in 2008, he was subject to the increased sentencing range established in the 2006 sentencing statute for this type of sexual felony. *See id.*

In Collins's first appeal, this Court held that the 2006 sentencing statute implicitly created two new nonstatutory grounds for defendants convicted of sexual crimes to seek referral to the statewide three-judge sentencing panel: (1) that they did not have a history of unprosecuted sexual offenses, or (2) that they had prospects for rehabilitation which, in other offenders, would be considered "normal" or "good." *See Collins v. State*, 287 P.3d 791, 797 (Alaska App. 2012). This Court therefore remanded the case for

the sentencing judge to evaluate the applicability of these new factors. *See id.* But in response to this Court's ruling, the State filed a petition for hearing with the Alaska Supreme Court, challenging this Court's interpretation of the sentencing laws. See Tentative Decision at 2-3. The supreme court accepted that petition. *See id.*

But before the supreme court could resolve the merits of the issue, the legislature spoke in 2013. It explained that in 2006, it did not intend, by enacting the increased penalties for sexual felonies, to create new or additional means for a defendant convicted of a sexual felony to obtain referral to the three-judge panel; consistent with this intent, the legislature amended the three-judge panel statutes to bar sentencing judges from using the factors this Court created in *Collins* as a basis to obtain referral to the three-judge panel. *See* Ch. 43, §§ 1, 22, 23 SLA 2013. Following the legislature's action, the supreme court subsequently dismissed the State's petition for hearing as improvidently granted. *See* Tentative Decision at 4.

On remand, Collins argued in the trial court and later on appeal that he should be permitted to take advantage of this Court's decision in *Collins* to obtain referral to the three-judge panel and to do otherwise would amount to an ex post facto violation. [At. Br. 13-22] Collins argued this even though the *Collins* factors did not expressly exist as stand-alone nonstatutory factors before the *Collins* decision, nor in light of the legislature's actions in 2013, did

they exist at the time Superior Court Judge Jonathan Woodman evaluated the case in 2017 following the remand.

In this Court's tentative decision, this Court concluded that, because "the 2013 session law was a clarification of Alaska's sentencing law rather than a modification of it, the ex post facto clause of the Alaska Constitution does not bar the courts from applying the law stated in the 2013 session law to cases that arose before the legislature acted—including Collins's own case, which provided the impetus for the legislature's clarifying enactment." *See* Tentative Decision at 18 (italics omitted). This Court therefore held "that Collins and other similarly situated offenders are not entitled to seek referral of their cases to the three-judge sentencing panel on the two grounds announced in the *Collins* majority opinion." *See id.* at 19.

However, this Court nonetheless decided to remand Collins's case. *See* Tentative Decision at 21-23. Specifically, this Court remanded Collins's case to the superior court so that the superior court could assess whether, given the totality of the circumstances in Collins's case, the applicable presumptive sentencing range would be manifestly unjust. *See* Tentative Decision at 21. This Court noted that while Collins could not seek "referral to the three-judge sentencing panel based solely on the two factors described in the *Collins* majority opinion, he is nevertheless entitled to seek a referral to the three-judge panel based on the assertion that his prescribed presumptive sentencing

range would be manifestly unjust under the circumstances of his case." *Id.* And in making this argument that the totality of the circumstances call for a lesser sentence, "Collins can include the claims (1) that he has committed no prior sexual offenses, and (2) that he has good prospects for rehabilitation." *See id.*

Notably, this Court observed that its prior decision in *Collins* "did not alter the analysis that a sentencing judge is required to conduct when a defendant seeks referral to the three-judge panel on the ground that a sentence within the applicable presumptive range would be manifestly unjust." *See* Tentative Decision at 21 (citing *State v. Seigle*, 394 P.3d 627, 635-38 (Alaska App. 2017)). Like in other cases, "the sentencing judge is required to employ the *Chaney* criteria to assess the totality of the circumstances of the defendant's case, and to then determine whether all sentences within the applicable presumptive range would be 'obviously unfair.'" *Id.* at 21-22 (citing *Seigle*, 394 P.3d at 635). "In making this assessment, the court must evaluate the facts of the defendant's current criminal episode, plus the defendant's history and underlying circumstances." *Id.* at 22.

Specifically, if the defendant asserts that any sentence within the applicable presumptive range would be manifestly unjust as applied to him, the sentencing judge would still be required to consider the defendant's potential for rehabilitation as part of the totality of the circumstances under

the *Chaney* criteria in deciding whether "manifest injustice" would result from a sentence within the presumptive range in that case. *See* Tentative Decision at 22. This Court noted that it had previously made similar observations on this aspect of sentencing law in *Seigle*, 394 P.3d at 635 and *Duncan v. State*, 782 P.2d 301, 304 (Alaska App. 1989). *See id.*

This Court then stated that "even though the superior court correctly ruled that the three-judge panel was barred from granting relief to Collins based *solely* on the two factors identified in *Collins*, this ruling did not constitute a complete resolution of Collins's request to have his case referred to the three-judge panel." *See* Tentative Decision at 22-23 (emphasis in original). This Court stated that "Collins could still seek a referral to the three judge panel on the theory that a sentence within the applicable presumptive range would be manifestly unjust, given the totality of the facts of his case." *Id.* at 23. It further noted that "at the time the superior court denied Collins's request for a referral to the three-judge panel, this Court had not yet issued our decision in *Seigle*. Thus, the superior court did not have the benefit of our decision in *Seigle* when it denied Collins's request for referral to the three-judge panel." *Id.* Consequently, this Court reasoned that it was appropriate to remand Collins's case to the superior court so that it can now consider this matter. *Id.*

C. Collins waived his right to seek referral to the three-judge panel based on manifest injustice

In this Court's tentative decision, it first held that the provisions of SLA 2013, chapter 43 did not alter Alaska sentencing law, but instead clarified it. *See* Tentative Decision at 23. It further held that application of the clarified sentencing law to Collins (and to any other similarly situated offenders) did not violate the ex post facto clause of the constitution. *See id.* And, it held that the superior court correctly ruled that Collins could not seek a referral to the three-judge sentencing panel based solely on the factors identified by this Court in *Collins*. *See id.* The State does not dispute this aspect of the Court's ruling.[1]

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[1] The State notes that after this Court issued its tentative decision in this appeal, the Alaska Supreme Court in the course of interpreting previous versions of the Alaska Sex Offenders Registration Act (ASORA) stated in *Maves v. State*, __ P.3d __, No. S-17492, 2021 WL 220664, at *5 (Alaska Jan. 22, 2021):

> We are not bound by the contemporaneous pronouncements of the governor and the bill sponsor that the 1999 legislation was intended to clarify the law rather than change it. Asking "'whether a legislature which has amended a statute intends to change or merely clarify the statute is usually fruitless' because the legislature's opinion as to the meaning of a statute passed by an earlier legislature is no more persuasive than that of a knowledgeable commentator."

Id. at *5 (quoting *Hageland Aviation Servs., Inc. v. Harms*, 210 P.3d 444, 448 n.12 (Alaska 2009) (quoting *Hillman v. Nationwide Mut. Fire Ins. Co.*, 758 P.2d 1248, 1252 (Alaska 1988))). The cases the supreme court relied on in *Maves* were previously analyzed by this Court in its tentative decision. *See* Tentative Decision at 13-17. The law in Alaska regarding clarifying legislation has not changed in any manner that impacts this Court's tentative decision.

However, in its tentative decision, this Court also ruled that a remand is appropriate because Collins could still "seek a referral to the three-judge panel on the theory that a sentence within the applicable presumptive range would be manifestly unjust, given the totality of the facts of his case." *See* Tentative Decision at 23. This is incorrect. As explained below, Collins has waived his right to seek referral to the three-judge panel on the basis of manifest injustice.

As previously detailed in the State's brief, Collins initially asked Superior Court Judge Eric Smith to refer his case to the three-judge panel on two bases: either because the non-statutory mitigating factor of extraordinary potential for rehabilitation applied, or because manifest injustice would result from the imposition of a sentence within the 20- to 30-year presumptive range. [R. 68-80] *See* AS 12.55.165(a) (explaining the two grounds for referral to the three-judge panel are that manifest injustice would result from failing to consider a non-statutory mitigating factor or that imposition of a sentence within the presumptive range would be manifestly unjust). As support for his request, Collins cited his lack of prior significant criminal history, his character, and his purported extraordinary potential for rehabilitation. [R. 68-80] Collins downplayed the fact that, following his bail release from jail on the underlying sexual assault charges in this case, he violated his conditions of release by consuming alcohol and lying to the police about his name. [R. 56-

60] (Collins received 90 days' incarceration for making the false statement. [R. 59, 642])

But at the sentencing hearing before Judge Smith, Collins expressly withdrew his argument that referral to the three-judge panel was appropriate on the basis of manifest injustice. [Tr. 788 ("[W]e want to withdraw the manifest injustice.")] And Judge Smith found that Collins had not proved by clear and convincing evidence that he was entitled to a non-statutory mitigating factor and referral to the three-judge panel. [Tr. 837-41]

It is the defendant's burden to demonstrate *in the superior court* by clear and convincing evidence that he is entitled to a non-statutory mitigating factor or that manifest injustice would result from the presumptive sentence. *See* AS 12.55.165(a). Here, Collins had the opportunity in 2009 to present evidence and argument to the superior court to establish that referral to the three-judge panel was warranted because of non-statutory mitigating factors or because manifest injustice warranted referral. But, after initially presenting a manifest injustice argument, Collins expressly withdrew this argument in the trial court. [Tr. 788 ("[W]e want to withdraw the manifest injustice.")] Collins's argument that a remand is warranted so he can argue for manifest injustice to the sentencing judge is therefore waived. *See Owens v. State*, 613 P.2d 259, 261 (Alaska 1980) (a defendant should not be allowed to "take a gambler's risk and complain only if the cards [fall] the wrong way");

Muller v. State, 478 P.2d 822, 828 (Alaska 1971) ("the appellants should not be permitted to blow hot at trial and then blow cold on appeal").

In light of Collins's actions in the superior court in 2009, it is not now appropriate over a decade later to remand the case for the sentencing judge to reconsider a sentence based on an argument that Collins expressly withdrew.

D. The law has not changed to warrant a remand and neither have the facts; Judge Smith considered and rejected referral based on the correct settled law, the applicable sentencing criteria, and the record

To recap, prior to this Court's 2012 decision in *Collins*, and now in light of the Alaska Legislature's actions in 2013, a person convicted of a sexual felony may not use the two non-statutory mitigating *Collins* factors—lack of documented prior sexual offenses and normal rehabilitation prospects—as stand-alone bases to obtain referral to the three-judge panel. *See* Ch. 43, §§ 1, 22, 23 SLA 2013. Rather, a person convicted of a sexual offense is treated the same as any other criminal defendant seeking referral to the three-judge panel. The person may present evidence and argument that demonstrate the manifest injustice of a sentence within the presumptive range. The law now is the same as it was before this Court's 2012 decision in *Collins*. Indeed, this Court has acknowledged that point in its tentative decision. *See* Tentative Decision at 22 (citing *Seigle*, 394 P.3d at 635; *Duncan*, 782 P.2d at 304).

Nevertheless, this Court apparently believes that its decision in *Seigle* provides a basis for referral that the trial court might have missed in its initial

decision on referral. But *Seigle* did not introduce anything new to three-judge panel law. Thirty years ago in *Duncan v. State*, this Court explained that, even if facts could not be deemed non-statutory mitigating factors, those facts could still be considered by the trial court in deciding whether a sentence based on a presumptive term is manifestly unjust. *See Duncan*, 782 P.2d at 304. The Court explained in *Duncan*:

> [I]f a defendant comes close to establishing a number of mitigating factors but fails to do so, the trial court may consider that fact, together with the totality of the circumstances, in determining that the presumptive sentence, irrespective of aggravating and mitigating factors, is manifestly unjust. Where, however, the trial court does not consider the presumptive term manifestly unjust, but rather wishes the three-judge panel to consider nonstatutory mitigating factors, it should not propose factors which the legislature has considered and rejected or modified to the point where they are unavailable to the defendant.

Id. (quoting *Totemoff v. State*, 739 P.2d 769 , 777 (Alaska App. 1987)).

This Court observed that although, "in repealing the former statutory mitigating factor [i.e., the fact that a prior conviction was less serious], the legislature made plain its view that a less serious prior conviction should not be elevated to the stature of a mitigating factor, this does not indicate that the legislature believed that the circumstances surrounding a defendant's prior offense should be deemed altogether irrelevant for sentencing purposes." *Duncan*, 782 P.2d at 304. To decide whether the presumptive term would be

manifestly unjust, the court must consider the totality of the circumstances surrounding the case:

> [T]he court must determine whether the sentence, taking into account all of the appropriate sentencing considerations, including the defendant's background, his education, his character, his prior criminal history, and the seriousness of his offense, would be obviously unfair in light of the need for rehabilitation, deterrence, isolation, and affirmation of community norms.

Id. (quoting *Totemoff*, 739 P.2d at 775). The nature and seriousness of an offender's prior criminal misconduct are a legitimate part of the totality of the circumstances; as such, they may be considered in the overall determination of manifest injustice even though they do not qualify as a stand-alone, non-statutory mitigating factor. *Id.*

In *Seigle*, this Court merely reiterated these settled points of law—that when the legislature has expressly barred use of a factor to obtain referral to the three-judge panel, it is not appropriate to use it as the sole basis for referral. *Seigle*, 394 P.3d at 635. But if the consideration of that factor, combined with the relevant sentencing criteria, and the totality of the circumstances, demonstrates that the imposition of a sentence within the presumptive range would be manifestly unjust, referral to the panel may be appropriate. *See id.* For example, this Court explained:

> [A] sentencing judge might reject a defendant's assertion of "extraordinary potential for rehabilitation," but if the defendant has favorable prospects for rehabilitation, the judge would still consider those favorable prospects as part of the totality of the

> circumstances when determining whether a sentence within the presumptive range would be manifestly unjust under the *Chaney* criteria.
>
> Similarly, there may be situations where a sentencing judge is legislatively precluded (because of the existence of certain aggravating factors) from sending the defendant's case to the three-judge sentencing panel on the basis of extraordinary potential for rehabilitation. Nevertheless, if the defendant asserts that any sentence within the applicable presumptive range would be manifestly unjust as applied to him, the sentencing judge would still be required to consider the defendant's potential for rehabilitation as part of the totality of the circumstances under the *Chaney* criteria in deciding whether "manifest injustice" would result from a sentence within the presumptive range in that case.

Seigle, 394 P.3d at 635. That is, while the legislature has barred sentencing judges from relying on the *Collins* factors as stand-alone factors justifying referral to the three-judge panel, it is permissible to consider a sex offender's lack of criminal history and normal prospects of rehabilitation, along with all of the other relevant facts—i.e., the defendant's conduct, the *Chaney* factors, etc.—in evaluating whether, under the totality of the circumstances, a sentence within the presumptive range would be manifestly unjust.

Since the underlying sentencing law has not changed on these points in the past several decades, it is not appropriate to remand the case to enable the superior court to reconsider the sentence in light of this Court's 2017 decision in *Seigle*. As explained in the prior section of this brief, Collins is not entitled to a "do-over" in order to revisit or present arguments about manifest

injustice since he had the opportunity to do so at the initial sentencing and withdrew such argument. [Tr. 788]

However, even if this Court's disagrees and concludes that Collins did not withdraw his manifest injustice argument, the fact remains that, in 2009, Collins presented his facts and his arguments regarding why the case should be referred to the three-judge panel. And Judge Smith carefully reviewed all of the arguments of the parties, the *Chaney* criteria, Collins's crime and record—including his lack of significant criminal history, his lack of prior documented sexual offenses, and rehabilitation prospects—and the totality of the circumstances, and concluded a sentence within the presumptive range was appropriate and thus referral to the three-judge panel was not appropriate. [*See, e.g.*, Tr. 789 (Judge Smith considering manifest injustice), 807-08 (Judge Smith considering manifest injustice in context of Collins's good reputation and lack of criminal history), 806-07 (the prosecutor pointing out why the sentence within the presumptive range would not be manifestly unjust), 812-15 (same), 816 (Judge Smith considering manifest injustice for sexual assault cases), 818-20 (the prosecutor explaining why the factual circumstances of crime—penile rape—warranted a sentence within the presumptive range), 821 (Judge Smith noting Collins's lack of criminal history of sexual assault), 823-24 (Judge Smith questioning whether the sentence within the presumptive range would "shock the conscience," i.e., the standard

for manifest injustice), 825-28 (the prosecutor explaining why in light of the 2006 changes to the sentencing scheme and Collins's case, a sentence within the presumptive range would not shock the conscience or be manifestly unjust or warrant referral to the panel), 830 (Collins's attorney arguing Collins can be rehabilitated sooner than the time encompassed within the presumptive range and requesting the three-judge panel referral), 838-41 (Judge Smith concluding that a sentence within the presumptive range would not amount to manifest injustice), 848-49 (Judge Smith concluding that a sentence outside the presumptive range was not appropriate)] Since the relevant sentencing law has not meaningfully changed, and since Judge Smith previously reviewed the record and the applicable sentencing criteria before declining to refer the case to the three-judge panel and then imposing a sentence within the presumptive range, a remand to enable Judge Smith to do that which he has already done—evaluate whether a sentence within the presumptive range is warranted for Collins—is not appropriate. And, for the reasons previously explained in the initial briefing in this appeal, manifest justice is not present. [Ae. Br. at 18-21 (2019)]

CONCLUSION

This Court should affirm Collins's sentence. It should not again remand the case to superior court.

Dated January 28, 2021.

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